No. 11947

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL WHOLESALERS, INC., a corporation,

Appellant,

vs.

INVESTORS COMMERCIAL CORPORATION,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Investors Commercial Corporation, appellee, respectfully submits this its brief upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Appellant submits two questions on this appeal and appellee answers them accordingly.

Question No. 1 and Assignment of Errors in Connection Therewith Being: "Where a Referee Has Made and Entered a Final Decree or Other Final Order, Does the Referee Thereafter Have the Power to Make or Enter an Order Amending or Modifying Said Final Decree, or Is That Exclusive Power Vested by Law and Rule in the United States District Judge to Review Such Final Decree?"

Argument.

Section 2 of Chapter II of the Bankruptcy Act of 1938, commonly known as the Chandler Act (United States

Code, Title 11, Chapter 2, Section 11), provides as follows:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . ."

and subsection 8 thereof provides:

> "Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown";

Section 1 of Chapter I of the Bankruptcy Act of 1938, commonly known as the "Chandler Act" (U. S. Code, Title 11, Chapter 1, Section 1), provides, among other things, as follows:

> "The words and phrases used in this Act and in the proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> Subsection (9) thereof: 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

Section 38 of said Bankruptcy Act provides for the jurisdiction of referees as follows:

> "Referees are hereby invested, subject always to a review by the judge with jurisdiction to (Subsection 6) perform such of the duties as are by this act conferred on courts of bankruptcy including those incidental to ancillary jurisdiction and as shown to be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

General Order 12 (1) of the present Bankruptcy Act, as amended, likewise provides that:

> "A referee in bankruptcy, after reference, can do anything that a judge can do, except adjudicate voluntary petitions; commit for contempt; hear jury trial when demanded; extradite a bankrupt; enjoin a court; transfer cases; and designate newspapers. There is doubt whether a referee can reopen closed cases. The better view is that he cannot. *However a local District Rule gives the referee jurisdiction to reopen cases.*" (Emphasis supplied.)
>
> *John Mitchell, Bankrupt,* 54 A. B. R. 476, 478.

> "Although there has been considerable authority that a referee, once having made an order, has no power to reconsider and amend or vacate it, *the better view seems to be that the referee, as a court, has such power.*" (Emphasis supplied.)
>
> Vol. 2, Collier on Bankruptcy, 14 Ed. page 1426.

The same question was up before the United States Circuit Court of Appeals (second circuit) in 1935 in the matter of *Potasch Bros. Co. Inc., Bankrupt,* 79 F. (2d) 613, 30 A. B. R. (N. S. 225, 231), and Judge L. Hand

in his opinion considered, reviewed and discussed all of the existing authorities on the problem including the case of *Farestein,* 58 F. (2d) 942, and concluded his decision by the following:

> "We hold that a referee has the same power over his orders as the district judge has over his."

There is nothing in the Chandler Bankruptcy Act, as amended, which specifically prohibits the passing upon the reopening of a closed case by a Referee and therefore the local rule of the District Court of California, Southern District, Central Division (*supra*), conferring such authority upon the Referee is a valid and binding rule of court. No formal procedure is prescribed or required for reopening an administration.

> *Schofield v. Moriyama* (C. C. A. Cal. 1928), 24 F. (2d) 473, 11 Am. Bk. Rep. N. S. 558.

The procedure to be followed in the Southern District of California for the reopening of a closed estate, as directed by Local Rule 208(a), is one of procedure exclusively and was adopted for the expeditiousness of business; it in no way affects the substantive rights of the parties, and, regardless of whether or not the Referee denies or grants the petition to reopen an estate, there is still a review to the District Judge by way of a Petition for Review.

Question No. 2 and Assignment of Errors in Connection Therewith Being: "Where a Plan of Arrangement Under Chapter XI of the Acts of Congress Relating to Bankruptcy Provides That All of the Unsecured Debts of the Debtor Shall Be Settled and Satisfied by the Payment of Certain Amounts Set Forth in the Plan, and the Plan It Thereafter Carried Out and the Amounts Are Paid, Is There an Accord and Satisfaction of Said Debts Which Acts as a Discharge of Any Obligation of the Debtor's Predecessors in Interest to Pay Said Obligation?"

Argument.

Chapter III, Section 16 of the Chandler Bankruptcy Act (U. S. Code, Title 11, Chapter 3, Section 34), provides:

> "The liability of a person who is a co-debtor with or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

Chapter XI, Section 302 of the Chandler Bankruptcy Act (U. S. Code, Title 11, Chapter 11, Sections 701-702), provides:

> "The provisions of Chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter."

We must, therefore, in construing the provisions of said Chapter XI refer to and include Chapter III and Section 16 thereof, as they are all included therein.

The Intention and Purpose of the Statute Is to Make a Discharge in Bankruptcy Personal to the Bankrupt and Not to Release Any Other Parties, Who May in Any Way Be Liable With Him.

"Discharge does not constitute payment."

American Improvement Co. v. Lilenthal, 43 Cal. App. 80;

8 C. J. S., pp. 1491, 1492.

"Ordinarily a discharge in bankruptcy of a debtor does not affect the liability of one liable with the bankrupt as a co-debtor, surety or guarantor."

8 C. J. S., 1546.

"A discharge in bankruptcy, being purely personal to the bankrupt, releases the Bankrupt from personal liability only."

8 C. J. S., 1559;

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

"Congress has the power to say from what debts a Bankrupt shall be discharged and from what liabilities he shall not be discharged, and it has exercised such power in specific provisions of the Bankruptcy Act."

8 C. J. S., 1497.

"A composition is a proceeding under which a bankrupt may settle with his creditors, if the majority so agree, by the payment of a lump sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. The proposed composition is presented to the Court, and, after notice

and hearing, if approved by the Court, an order is made confirming the same."

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 83.

"Confirmation is in effect a discharge. Its effect is to supersede the bankruptcy proceedings, and reinvest the Bankrupt with all his property free from the claims of his creditors."

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 83.

"The composition has no more effect than a discharge would have under the same circumstances. Both a discharge and a composition releases the bankrupt from all his provable debts, except those specified in Sec. 17 of the Act. A discharge, however, is not a payment or an extinguishment of the debts, it is simply a bar to all future legal proceedings for the enforcement of the debts or obligations discharged, except such as are by way of enforcement of a lien therefor, not itself invalid. The discharge has merely destroyed the remedy, but not the indebtedness."

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

"Undoubtedly, the composition released Hammond from further personal liability to pay the judgment obtained against him in the action, but it did not affect the security afford by his lien."

American Improvement Co. v. Lilenthal, 43 Cal. App. 80, 84.

"This section is declaratory of a general principle of law. It results from two well-settled doctrines: (1) that a discharge in bankruptcy affects only the personal liability of the debtor, and not the

liability of other persons, and (2) that such a discharge is by operation of law and not by consent: It is well settled that the principle thus stated applies only to the discharge in bankruptcy and not to any act of the parties that may be construed as effecting a release."

Vol. I, Collier on Bankruptcy (14th Ed), pp. 1522, 1523.

"Since the creditor still has the right to collect from any other person liable for the debt, a pending suit against such other person is not affected by the discharge. The section is applicable even though the discharge is effected with the consent of a majority of the creditors, as by an arrangement, or the discharge is obtained in corporate reorganization proceedings under Chapter X. The right to execution or supplementary proceedings against the co-debtor is not affected by the bankruptcy proceedings."

Vol. I, Collier on Bankruptcy (14th Ed.), pp. 1524, 1525.

"Nor is the creditor prejudiced by filing proof of his claim or by accepting a dividend on liquidation in bankruptcy of the debtor's estate or in a composition under the former composition provisions of the Bankruptcy Act."

Vol. I, Collier on Bankruptcy (14th Ed.), p. 1526.

"An arrangement or reorganization plan purporting to release a surety or guarantor should not be attacked collaterally in a suit to recover from the surety or guarantor. While the possibility of a collateral attack is not necessarily foreclosed under Stoll v. Gottlieb, it is advisable that the dissenter apply for a modification of the arrangement or reorganization

plan, or move to vacate a court order, if any, restraining a suit on the guaranty, and if denied the only remedy is by appeal."

Vol. I, Collier on Bankruptcy (14th Ed.), p. 1530.

"The acceptance of a composition and even the voting in support of it, does not discharge the guarantor of the obligation."

A. Klipstein & Co. v. Henry Lipschitz, Vol. X, A. B. R. (N. S.), pp. 600, 602.

"It must be noted also that there is a difference between a common-law composition and a composition in bankruptcy. In the former the creditors voluntarily release the principal debtor and therefore release co-debtors, while in the case of a bankruptcy composition the discharge is by operation of law and not by act of the creditor who assents to the composition."

Barker v. Ackers, 29 Cal. App. (2d) 162, 175.

"Upon the institution, as in the instant case, of proceedings for corporate reorganization under Section 77b of the Bankruptcy Act, the creditor is forced to cooperate in the proceedings for a composition or a corporate reorganization, for whether or not he appears or consents to a composition or corporate reorganization, the bankrupt or debtor, as the case may be, may be discharged. The creditor is without choice but to attempt to obtain or assent to the composition or plan of reorganization which he deems the most favorable. For this reason, undoubtedly, *it has been repeatedly held that a composition in bankruptcy in no way discharges the co-debtor, whether or not he consents to the composition.*" (Emphasis supplied.)

Barker v. Ackers, 29 Cal. App. (2d) 162, 175.

Conclusion.

From the foregoing it is respectfully submitted:

(1) That the order of amendment made by the Referee which order was confirmed by the Honorable J. F. T. O'Connor, United States District Judge, was proper.

(2) That the Bankruptcy Court has no authority to release co-debtors, sureties or guarantors of the bankrupt and that there is no accord and satisfaction by virtue of proceedings under Chapter 11 of the Bankruptcy Act.

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